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92-394

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANFORD WILLIAMS, LANCE CORPORAL,
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Does the United States Constitution's Appointments Clause preclude Congress from granting the Judge Advocate General of the Navy the power to appoint military trial judges?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Danford Williams, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on June 5, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Williams,* 34 M.J. 250 (C.M.A. 1992), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Williams,* No. 90-0251, slip op. (N.M.C.M.R. April 5, 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps

Court of Military Review on June 5, 1992. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATION INVOLVED

The pertinent portion of Art. II, § 2 is set forth in Appendix C. The text of 10 U.S.C. § 826 is set forth in Appendix D. The text of Rule for Courts-Martial 801 is set forth in Appendix E.

STATEMENT OF THE CASE

Contrary to his plea, petitioner was found guilty of one count of rape in violation of 10 U.S.C. § 925. Thereafter, the trial judge sentenced petitioner to confinement for 10 years, forfeiture of all pay and allowances, reduction to the lowest enlisted rank, and a dishonorable discharge. On appeal, in an unpublished opinion, the Navy-Marine Corps Court of Military Review affirmed the conviction and sentence. *United States v. Williams,* No. 90-0251, slip op. (N.M.C.M.R. April 5, 1991). The Court of Military Appeals affirmed the Navy-Marine Corps Court's decision. *United States v. Williams,* 34 M.J. 250 (C.M.A. 1992).

REASON FOR GRANTING THE WRIT

CONGRESS' PLACEMENT OF THE POWER TO APPOINT MILITARY TRIAL JUDGES IN THE JUDGE ADVOCATES GENERAL IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION.

A judge presiding over a general court-martial is, for all practical purposes, the equivalent of a United States District Court judge presiding over a felony trial. A

general court-martial judge has far-ranging powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power."[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801(a)-(b). In a case such as this, where the accused chooses a bench trial, the court-martial judge has even more discretion than the federal district court judge because the court-martial judge is not constrained by the Federal Sentencing Guidelines. *See United States v. Brown,* 28 M.J. 470, 474 n.3 (C.M.A. 1989). The trial judge in this case could have imposed any sentence ranging from no punishment to confinement for life. Manual for Courts-Martial, United States, 1984, Pt. IV, ¶ 45e(1); Rule for Courts-Martial 1002.[2]

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. art. II, § 2, cl. 2. Congress can devolve appointment authority upon no other official. *Freytag v. Commissioner of Internal Revenue,* 111 S. Ct. 2631, 2642 (1991). There can be little

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[1] "A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both." 10 U.S.C. § 848 (1988).

[2] "Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized by this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment."

doubt that military trial judges, who exercise extraordinary authority and discretion, are Officers of the United States. *See Buckley v. Valeo,* 424 U.S. 1, 126 (1976) (per curiam). Yet Congress vested the power to appoint military trial judges in the Judge Advocates General. 10 U.S.C. § 826. Placing the power to appoint judges in such low-level officials[3] raises a serious question under the Appointments Clause.

As in *Freytag,* "[i]t is beyond question . . . that Congress did not intend to grant to the President the power" to appoint military trial judges. 111 S. Ct. at 2642. Nor is the Judge Advocate General of the Navy, who is a subordinate of the Secretary of the Navy, 10 U.S.C.A. § 5148 (West Supp. 1991), a Head of a Department. It is self-evident that the Judge Advocate General of the Navy, who is by statute an Executive Branch officer tasked with performing legal duties "under the direction of the Secretary of the Navy," *id.* at § 5148(b), (d), is not a "Court of Law." Thus, Congress gave the power to appoint military trial judges to an impermissible official.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag,* 111 S. Ct. at 2638. This concern is directly implicated by allowing the Judge Advo-

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[3] The Judge Advocates General are not even the primary legal advisors in their respective services. Rather, "The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense." Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992) [Appendix F].

cates General to appoint military trial judges. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).

The significance of the Appointments Clause defect is magnified by the fact that military trial judges serve without the protection of a fixed term of office. *See generally United States v. Graf,* 32 M.J. 809 (N.M.C.M.R. 1990), *petition granted,* 34 M.J. 169 (C.M.A. 1991). Thus, not only are military trial judges *appointed* by the Judge Advocates General, they serve at the pleasure of the Judge Advocates General, who may *remove* them from office. Giving such low-level officials the power of appointment and removal carries the risk that these powers will be used to advance the parochial interests of the Judge Advocates General.

The appointment of military trial judges in violation of the Appointments Clause is a serious constitutional defect which the Court should address immediately. In *Freytag,* the Court indicated that "[t]he alleged defect in the appointment of the special trial judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." 111 S. Ct. at 2639. This comports with the Court's

earlier recognition that individuals appointed in violation of the Appointments Clause may not be involved in "the administration and enforcement of the public law[.]" *Buckley v. Valeo*, 424 U.S. at 139. Thus, until Congress places the power to appoint military trial judges in a constitutionally permissible official, every court-martial is invalid.

Finally, despite the fact that this issue was not raised below, the Court should not treat it as waived or forfeited. *See Freytag*, 111 S. Ct. at 2647 n.2 (Scalia, J., concurring). As noted in *Freytag*, the Court "has exercised its discretion to consider nonjurisdictional claims that have not been raised below." 111 S. Ct. at 2639 (citing, *inter alia, Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962)). The Court emphasized, "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag*, 111 S. Ct. at 2639. Due to the importance of this issue to the entire military justice system and to the rule of constitutional law, the Court should hear the Appointments Clause issue.

CONCLUSION

The manner in which military trial judges are appointed presents a serious constitutional issue: may Congress vest the power to appoint Article I court judges in an official who is statutorily subordinate to the Secretary of a Department? This issue strikes at the heart of the military justice system's structural integrity. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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SEPTEMBER 2, 1992

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 66,705.
NMCM 90 0251.

UNITED STATES, APPELLEE,

v.

DANFORTH [SIC] WILLIAMS, LANCE CORPORAL,
U.S. MARINE CORPS, APPELLANT.

Argued Jan. 8, 1992.
Decided June 5, 1992.

For Appellant: *Lieutenant R.G. Arrambide,* JAGC, USNR (argued); *Captain M.K. Schaller,* USMC (on brief).

For Appellee: *Major Laura L. Scudder,* USMC (argued); *Colonel T.G. Hess,* USMC (on brief); *Commander Thomas W. Osborne,* JAGC, USN, and *Major Rose M. Favors,* USMC.

Opinion of the Court

WISS, Judge:

In a contested general court-martial by military judge alone, appellant was convicted of raping his 2-year-old stepdaughter[1] and was sentenced to a dishonorable dis-

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[1] *See* Art. 120, Uniform Code of Military Justice, 10 USC § 920. Appellant was acquitted of an additional charge alleging kidnapping his then-estranged wife, in violation of Article 134, UCMJ, 10 USC § 934.

charge, confinement for 10 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Military Review affirmed without opinion.

We granted appellant's petition to consider his claim that the evidence is insufficient as a matter of law to sustain his conviction. Specifically, he urges that the evidence is legally insufficient to prove that he ever had sexual intercourse with his stepdaughter. We disagree and affirm. *See Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Harper,* 22 MJ 157 (CMA 1986).

Appellant and his wife married in January 1988; his wife had a daughter who, at that time, was about 1 year old. The record is not clear whether the family lived together thereafter and if so, for how long. It is apparent, though, that appellant's wife and her daughter lived in Arizona with his wife's mother and the mother's boyfriend – apart from appellant – from September 1988 until December 23, 1988. On the latter date, appellant and his family were reunited and moved into base housing in California.

On January 20, 1989, appellant and his wife took the little girl to the base emergency room because she had excessive vaginal discharge. There, following examinations and laboratory tests, it was determined that the girl had gonorrhea. As a precaution, appellant and his wife also were tested for the disease. Appellant's first test was inclusive because gonorrheal bacteria was not detected inside the white blood cells; however, appellant's sample was cultured and thereafter did reveal the bacteria.[2] His wife,

---

[2] Apparently, there are a number of strains of gonorrhea, but for some reason neither the child nor appellant was tested to determine the particular strain each had. Although both of them had a type that

however, never tested positive for the disease, even though they had engaged in a normal pattern of marital sexual intercourse.[3]

As trial counsel accurately phrased it at the outset of his closing argument: "[T]here are two central questions that have to be answered here today . . . Did a rape occur; and was the accused the one who raped the step-daughter."

Did a rape occur?

On February 10, 1989—three weeks after the gonorrhea was discovered—the child was examined by Dr. Herbert A. Giese, a medical doctor who was qualified at trial "as an expert in pediatrics and child sexual abuse." His examination included use of a culdescope—"an instrument which provides magnification from 5 to 30 power, has binocular vision and a good light source, specifically designed for examining light female genitalia." Through the culdescope, Dr. Giese was able to obtain two "photographs of the child's genitalia and particularly the hymenal ring." Referring to these pictures, Dr. Giese explained in a straightforward way the factors that, together, led him to conclude that the girl had been the victim of vulvar intercourse by the head of a penis.

The "first irregularity" was that "[t]he hymenal membrane . . . was sort of floppy and redundant and it tended to stretch very easily." This feature "can be normal" and is distinctive only when considered with other factors revealed by the exam.

---

is sensitive to penicillin, approximately 95% of gonorrhea found in the California and Arizona areas responds to penicillin, so the probative value of this factor seems rather slight.

[3] Expert testimony at trial reflected that a negative result from a "vaginal culture" in an adult woman is not "conclusive"; "that is, the disease may be present but not detected by the culture."

The "second irregularity" was "the bump at the 6 o'clock position." Although the bump itself may not be significant, the bump in this case "was bound to a vaginal ridge which was on the inside. . . . [T]his area was inflamed and then scar tissue bound the two together."

The next irregularity was the diameter of the hymenal ring when "stretch[ed] to a . . . relaxed position." In this position, which offers an opening of the ring "to a maximum amount," the child's ring measured 6 millimeters from top to bottom and also from side to side. This contrasted with "the acceptable upper normal limit of normal for children under 5" years of age of 5 millimeters. Again, this factor, "in mind of itself, does not indicate that the child has been traumatized." Its significance is as one piece of the entire puzzle.

The fourth irregularity addressed two characteristics of the mound that Dr. Giese earlier had referred to as a "bump." The doctor pointed out "a white linear discoloration in the mound which I believe represents scar tissue." He continued:

> [A]lso there is vascular disruption in this area; there's vascularity which runs out to it [the mound] and then stops and then there's vascularity on the other side which seems to come up approximately to it but there's no cross over of those blood vessels; whereas the rest of the hymen, there is a lacy pattern of blood vessels where [there] is no interruptions.

Dr. Giese explained "the significance of" this evidence as follows:

> I think that is a scar in the hymen that occurred because of a tear that has rehealed itself; and the mound and attachment to the vaginal ridge are part of that healing process.

He concluded: "She had a hymenal tear which has rehealed; and this occurred because of some form of hymenal penetration."

Attention then turned to the nature of the object that had penetrated the child. First, the doctor ruled out self-infliction. Even if she had masturbated, which, while "not real common with 2-year olds, it does occur, she would be paying attention up to the *superior* area where the clitoris is, because that is the sensitive area that induces a pleasural sensation." (Emphasis added.) It will be recalled that the evidence of a tear was in the *lower* "6 o'clock" area of the hymenal ring. Additionally, Dr. Giese observed that "[i]njury to the hymen is painful in children; and, in fact, touching the hymen in some children is an uncomfortable experience."

The question which next logically followed was: "Could those injuries that you noted have been caused by penetration from a male penis?" Dr. Giese responded:

> Yes, they could have but probably not full penetration. Full penetration, I would have expected much more damage and a larger opening. The most common source of partial dilation with a transection is a situation called vulvar intercourse which is when the head of the penis and the tip of the penis is placed in the introitous and pressure put against the area but there's not full penial intromission. Because of the conical shape of the head of the penis, as that began to press in, this would stretch the hymen until it reached the point that it couldn't give anymore and then it would tear; and I think that's what—and the most common place where injuries occur is at the 6 o'clock posterior area.

When asked, then, whether it was his "opinion . . . that vulvar intercourse took place," Dr. Giese answered, "Yes."

At this point, trial counsel moved along to address the matter of the child having gonorrhea:

> Q. If you knew also that the child had had gonorrhea, would that add anything to your opinion as to what caused the injuries?
>
> A. Yes, it would further strengthen the opinion since Neisseria gonorrhoeae is a very fastidious organism and does not survive very long outside the human body and is transmitted, in my opinion, is prima facie information that the child had some form of sexual contact in order to acquire that.

Dr. Giese ruled out the possibility that the child had been born with the disease (it would have disappeared, even without treatment, long before her then-present age). Moreover, under rather extensive further examination by both trial and defense counsel, Dr. Giese found it "possible" but not probable for a number of reasons that the child had acquired the disease from a finger or some other foreign object. On redirect examination, trial counsel sought to quantify somewhat the terms "probable" and "reasonable" that had been used by defense counsel as follows:

> Q. So when you say that you believe that the injuries were more likely than not caused by vulvar intercourse, are you saying that there is only a 51 percent likelihood or more?
>
> A. No, I'm talking more in the realm of statistical probability, in the realm of 95 percent.

Who was the perpetrator?

If the child had been sexually abused, as Dr. Giese indicated was his opinion, the next question, of course, was – who did it. In this connection, it became critical to

determine the timeframe in which the girl might have contracted the disease and who had access to her during that period.

Dr. Yowell, who was the girl's examining physician at the hospital on January 20, testified on direct examination by the prosecutor that, in adults, "you wouldn't expect to see any symptoms for 2 to 10 days after contacting." When asked whether "the incubation period" was different for children, he responded, "I don't have any data to support a judgment on that."

On cross-examination, though, Dr. Yowell was less precise about the incubation period:

> Q. Now, you also talked about a typical incubation period of 2 to 10 days; is that correct?
>
> A. In adults.
>
> Q. Now, based on your experience, that can be longer; is that correct?
>
> A. That's correct.
>
> Q. In your experience, you have seen it up to 60 days; is that correct?
>
> A. That's correct.
>
> Q. It's not unusual for it to be 30 to 60 days; is that correct, that's not the norm but about 20 percent?
>
> A. I don't know if I can definitely put a figure on it.
>
> Q. Certainly not unusual?
>
> A. Not unremarkable [sic] to have longer incubation periods.

When trial counsel inquired on redirect about the frequency of delayed symptoms, Dr. Yowell testified that "longer than 10 days is—it's not a daily occurrence, I would say unusual but not unremarkable [sic]" and that "[m]ore than 60 days would be exceptional; very rare."

Dr. Giese also was asked to address this subject during his testimony:

> The normal incubation time can be anywhere from as short a time [as] two days to as long a time as a couple of weeks before the child would develop signs of vaginitis. Children do not—virtually always develop signs of vaginal infection when this organism is inoculated into the vagina primarily the mucous membrane is so thin, they don't have the estrogen buildup of the lining so that they are relatively resistant. So vaginitis is a very common occurrence in children who have gonorrhea.

On examination by the judge, Dr. Giese clarified this opinion:

> In general, for children it would be [abnormal to see an incubation period of 30 days], because in the adult, you have the situation where you can have asymptomatic infection, so that you really don't know that they've got the infection; they, essentially, become carriers, they have an active infection but don't demonstrate clinical symptoms. In children, they usually show up with clinical symptoms of vaginitis when it is—gains entrance into the vaginal track. So, two days to two weeks would be probably fairly accurate for children, and more likely two days.

The significance of the evidence of the likely incubation period, as indicated earlier, is in answering the question of who had access to the child when she likely was infected. Dr. Giese's testimony is ample basis upon which reasonable factfinders could conclude that the victim had been abused somewhere between 2 days and 2 weeks prior to her exhibiting symptoms of vaginitis on January 20, and Dr. Yowell's testimony as a whole is not inconsistent with this conclusion.

In this light, defense evidence that, sometime in mid-November 1988, the boyfriend of appellant's mother-in-law had access to the child and was a person of somewhat questionable character becomes less relevant. The evidence of record is that, during January 1989, the only persons known to have had access to the child for any period of time alone was appellant on three occasions, his wife, and a babysitter – who testified that, during the 2 hours in which she once had cared for the girl, no one else was present.

Conclusions

Although we have not attempted to set forth all of the evidence presented by the prosecution and the defense, the foregoing is a fair summary of the state of the evidence before the factfinder. "In resolving legal-sufficiency-[of-evidence] questions, this Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Blocker,* 32 MJ 281, 284 (CMA 1991); *United States v. Hart,* 25 MJ 143 (CMA 1987), *cert. denied,* 488 U.S. 830, 109 S.Ct. 85, 102 L.Ed.2d 61 (1988). It is clear to us that there was "sufficient evidence . . . from which a court-martial may find or infer beyond a reasonable doubt those facts required by law for conviction," *see United States v. Harper,* 22 MJ at 161 – specifically, as to the controverted issues in this case, that appellant's stepdaughter had been sexually abused by penetration of her vagina with a penis and that appellant was the penetrator.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX and CRAWFORD concur.

GIERKE, Judge (dissenting):

I agree with the majority's conclusion that the evidence, when construed in the light most favorable to the prosecution, is sufficient for a reasonable trier of fact to have concluded that the victim was sexually abused. I part company from the majority when they conclude that a reasonable trier of fact could also have found beyond a reasonable doubt that appellant was the abuser.

Appellant was a Marine with an impeccable reputation and military record, unlike the grandmother's boyfriend, acknowledged by the majority opinion to be "a person of . . . questionable character." 34 MJ at 253. Appellant denied under oath that he abused the victim. The victim's mother, a prosecution witness, testified that on every occasion when the victim was left alone with appellant, the victim was sleeping peacefully when the mother left her and sleeping peacefully when the mother returned. The victim showed no signs of distress or physical pain after being left alone with appellant.

The victim's mother also testified that when the victim was left with the grandmother's boyfriend, she was sleeping peacefully when the mother returned. Either the mother was being less than completely truthful or there is yet another possible penetrator.

The only evidence tending to identify appellant as the abuser is the evidence that both he and the victim had a generic type of gonorrhea which was not further identified. The grandmother's boyfriend, an equally probable suspect, was not tested for gonorrhea.

Commander (CDR) Yowell, the first medical doctor to examine the victim, testified that he "noted a copious discharge in the vaginal area . . . and because of the unusual nature and the large amoung of discharge, I obtained a gram stain. . . ." CDR Yowell obtained a medical

history from the mother. The mother told CDR Yowell that she had noticed the vaginal discharge 2 days before bringing her to the hospital. Neither CDR Yowell nor any other expert opined how long the victim had been infected when she was examined on January 20, but the clear import of CDR Yowell's testimony is that she had been infected for a significant time. A "copious discharge" is not consistent with the first onset of symptoms.

Without evidence showing how long the victim had been infected, the evidence regarding the incubation period of gonorrhea does not exclude the grandmother's boyfriend as an equally probable penetrator. Narrowing the list of suspects down to two is not enough to prove guilt beyond a reasonable doubt. Accordingly, I dissent.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY MARINE CORPS COURT OF MILITARY REVIEW
BEFORE

R. A. STRICKLAND T. A. LAWRENCE NEIL B. DANBERG, JR.

UNITED STATES

v.

DANFORD WILLIAMS, 247 47 2035
LANCE CORPORAL (E-3), U. S. MARINE CORPS

NMCM 90 0251 Decided 5 April 1991

Sentence adjudged 23 August 1989. Military Judge: J. L. Newton. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 7th Marine Expeditionary Brigade, Fleet Marine Force, Twentynine Palms, CA, Twentynine Palms, CA 92278-5407.

LT ROBERT E. WALLACE, JAGC, USNR, Appellate Defense Counsel
Capt M. K. SCHALLER, USMC, Appellate Defense Counsel
Maj ROSE MARIE FAVORS, USMC, Appellate Government Counsel
LtCol CHARLES R. SALOMON, USMCR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignment of error, and the Government's reply thereto, and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence as approved on review below are affirmed.

R. A. STRICKLAND, Senior Judge

T. A. LAWRENCE, Judge

(ABSENT/CONCURS)
NEIL B. DANBERG, JR., Judge

APPENDIX C

U.S. Const. art. II, § 2

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

APPENDIX D

10 U.S.C. § 826, Article 26, Uniform Code of Military Justice. Review by Court of Military Review

§ 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shal be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned

and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

APPENDIX E

Manual for Courts-Martial, United States, 1984,
Rule for Courts-Martial 801

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

(2) Ensure that the dignity and decorum of the proceedings are maintained;

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purpose of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

(b) *Rules of court; contempt.* The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence.* The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) *Uncharged offenses.* If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.

(e) *Interlocutory questions and questions of law.* For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) *Rulings by the military judge.*

(A) *Finality of rulings.* Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling.* The military judge may change a ruling made by this or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions.* When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

(2) *Rulings by the president of a special court-martial without a military judge.*

(A) *Questions of law.* Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) *Questions of fact.* Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) *Changing a ruling.* The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) *Presence of members.* Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) *Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.*

(A) Determination. The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) *Instructions.* When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) *Voting.* When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) *Consultation.* The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) *Standard of proof.* Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

(5) *Scope.* Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

APPENDIX F

[SEAL] [SEAL]

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000

March 3, 1992

MEMORANDUM FOR:

SECRETARIES OF THE MILITARY DEPARTMENTS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services

Among the chief duties of the Secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments within the Department of Defense.

Accordingly, pursuant to Title 10, including Sections 113, 3011, 5011, and 8011, and Department of Defense Directive 5105.2, this is to direct effective immediately as follows:

(1) The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense.

(2) The General Counsels of the Military Departments shall be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services within their respective departments.

(3) Civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a Military Department shall be subject to the authority of the General Counsel of that Military Department with respect to the performance of those legal duties.

(4) The General Counsels of the Military Departments shall ensure that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the Military Departments comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsels of the Military Departments shall be the controlling legal opinions of their respective Departments.

(6) The General Counsels of the Military Departments, subject to the authority, direction and control of the Secretaries of the Military Departments, shall implement this memorandum in a manner consistent with applicable law, including Sections 806, 825, 827, 854 through 870, 873, 874, and 945 of Title 10.

Nothing in this memorandum shall be deemed to create any right in any person not otherwise prescribed by law or regulation.

/s/ D.J. Atwood

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Supreme Court, U.S.
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No. 92-394

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANFORD WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-11a, is reported at 34 M.J. 250. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 12a-13a, is unpublished.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 5, 1992. The petition for a writ of certiorari was filed on September 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was charged with one count of rape of his two-year-old stepdaughter, in violation of 10 U.S.C. 920. He was sentenced to confinement for ten years, a dishonorable discharge, total forfeiture of pay and allowances, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged. The Navy-Marine Corps Court of Military Review affirmed the conviction and sentence. The Court of Military Appeals granted petitioner's request for review and affirmed the judgment of the Navy-Marine Corps Court of Military Review.

ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy, in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.

First, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise his Appointments Clause claim at or before trial and therefore has waived that claim under the rules of military procedure. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984*, at II-109.[1]

[1] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and,

Petitioner also did not raise that claim in the court of military review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner therefore cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[2]

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Frey-*

unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[2] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decisions in any case to less than all the issues urged by the accused. 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

tag to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite their failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

Freytag, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question presented in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court. Finally, the Court of Military Appeals has recently granted discretionary review to resolve this question. See *United States* v. *Weiss*, No. 67869/MC (C.M.A. June 16, 1992). Once that court has spoken on the matter, there will be ample time to address the question presented by this petition.

Second, there is no conflict among the circuits on the question presented by the petition. Only two appellate courts have addressed this subject; both courts are intermediate appellate courts in the military justice system; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Prive*, No. 984 (C.G.C.M.R. July 6, 1992); *United States* v. *Coffman*, No. 92-1030 (N.-M.C.M.R. June 3, 1992).

Third, petitioner's claim lacks merit. The question presented in this case is identical to the one presented in *Allen* v. *United States*, No. 92-273. For the reasons given in our brief in opposition in that case (a copy of which has been provided to petitioner's counsel), petitioner's challenge to the qualifications of the military trial judge in his case lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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On Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's Brief in Opposition notes that two Courts of Military Review have rejected the issue presented. Brief in Opposition at 4. Neither opinion, however, was correctly decided.

In *United States v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), the Coast Guard Court of Military Review expressly held that general court-martial judges are officers, not mere employees, of the United States. *Id.* at 572-73. The Coast Guard Court, however, held that Congress is

not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. *Id.* at 576-77. This holding is inconsistent with this Court's command that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

In *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam), the Navy-Marine Corps Court of Military Review held that the method by which military trial judges are appointed satisfies the Appointments Clause because all of these judges had earlier been appointed and confirmed as military officers. *Id.* at 592. This argument, however, misses the whole point of the Appointments Clause. While the trial judge in this case was appointed by the President *as a military officer*, he was not appointed by the President *as a judge*. Judge Newton had the authority to decide guilt or innocence and sentence petitioner *not* because Judge Newton was a military officer, but because he was filling the office of general court-martial judge. The *independent* judicial authority which Judge Newton and other military trial judges possess is quite different from the structured, accountable authority which other military officers exercise.

Coffman relied in part on *Shoemaker v. United States*, 147 U.S. 282 (1893). 35 M.J. at 592. This reliance, however, is misplaced. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *officers*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military trial judges are appointed because Congress did not

provide that service as a judge is an additional duty of some other *office*. A general court-martial judgeship is not an appurtenance of another position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, military trial judges do not serve *ex officio*. Thus, *Shoemaker* does not resolve the Appointments Clause issue.

CONCLUSION

Because the petition presents an unresolved constitutional question which affects every case tried by a court-martial, this Honorable Court should issue a writ of certiorari.

Respectfully submitted,

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